IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.2548 of 1998
**

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

1 to 5 : NO

PRABHATBHAI BHANABHAI

Versus

STATE OF GUJARAT

Appearance:

MS SUBHADRA G PATEL for Petitioner

RULE SERVED for Respondent No. 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 06/05/98

ORAL JUDGEMENT :

The petitioner under the order of detention dated 29.11.1997 passed by the Police Commissioner for the city of Rajkot invoking his powers under sec.3(2) of the Gujarat Prevention of Anti Social Activities Act ("the Act" for short) is arrested and kept under detention. The petitioner by this application under Article 226 of the Constitution challenges the validity and legality of

the order.

2. The Police Commissioner had information that the petitioner is a dangerous person, and by his subversive and nefarious activities, was disturbing the public order. He, therefore, studied the record of different Police Stations and found that two complaints; one at Bhaktinagar Police Station and another at Rajkot Taluka Police Station, were lodged as the petitioner was allegedly making use of sword or knife and likewise weapons. The petitioner had committed the offences punishable under sections 324, 323, 504, 302 read with 114 of IPC and sec.135 of the Bombay Police Act. He had caused grievous injuries and murder. It was also found that apart from these two complaints many other complaints could have been registered, but for the people feeling insecured, and owing to fear not going to Police Station to lodge complaint. The people very well knew that if action against the petitioner was taken they would have to face dire consequences. The Police Commissioner, therefore, decided to have some statement for taking appropriate action in the matter, but no one was willing to come forward and give statement because of fear of violence. After considerable persuasion and that too when assurance was given that particulars disclosing their identity would be kept secret, some persons showed willingness to give statements. After the statements were perused, the Police Commissioner also found that the activities of the petitioner striking terror in the society and disturbing public order were required to be curbed. He also realised that any action taken under general law would yield no result. In his view the only way out was to pass the impugned order and detain the petitioner. In the result the order came to be passed and at present the petitioner is kept under detention.

3. While challenging the order, the petitioner has raised several grounds, but, at the time of hearing, the learned advocate representing the petitioner confined to the only point, namely exercise of privilege under section 9(2) of the Act, going to the root of the case. Both the parties, therefore, submitted on that point alone. I will, therefore, confine to that point only.

4. Before I proceed, it would be better if the law about the non disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual

material which led to inference namely not to disclose certain facts, but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected form such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non disclosure has to be exercised sparingly and in those cases, where public interest dictating non disclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from some constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bona fide exercise of the powers about disclosure and privilege regarding non disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining

authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal mala fides. For my such view, a reference of a decision in the case of Bai Amina, w/o Ibrahim Abdul Rahim Alla v. State of Gujarat and others, 22 GLR 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel v. State of Gujarat and others, 35 (1) [1994 (1)] GLR 761, may be made.

5. In view of such law, it was absolutely necessary on the part of the detaining authority to file affidavit and explain what were the circumstances and facts which led him to exercise his jurisdiction in the public interest. It is pertinent to note that no such affidavit is filed. It can, therefore, be assumed that without application of mind and without just cause, the privilege is exercised. Reading the order it appears that the task to ascertain whether fear expressed by the witnesses is honest or genuine or is imaginary or merely an excuse was entrusted to the subordinate officer. Whatever report was sent, the detaining authority reposing trust, accepted the same and passed order. He has, thus, passed the order without application of mind and without examining the report as to whether it was reliable and hence the subjective satisfaction of the detaining authority is vitiated. The facts suppressed ought to have been furnished to the petitioner. Had the same been furnished the petitioner could have pointed out before the authority as to how those statements were not reliable. Right to make effective representation is thus jeopardised. The continued detention, therefore, cannot be held to be constitutional and legal. The order of detention is, therefore, required to be quashed.

6. For the aforesaid reasons the application is allowed. The order of detention dated 29.11.1997 passed by the Police Commissioner for the city of Rajkot is hereby quashed and set aside. The petitioner is ordered to be set at liberty forthwith, if he is not required in any other case. Rule is accordingly made absolute.

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